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| KIPP ACADEMY CHARTER SCHOOL,<br><br>Employer,<br>and<br><br>NICOLE MANGIERE<br>and<br>CHRISTOPHER DIAZ,<br><br>Petitioners,<br>and<br><br>UNITED FEDERATION OF TEACHERS,<br>LOCAL 2, AFT, AFL-CIO,<br><br>Union. | : | Case No. 02-RD-191760 |

**EMPLOYER'S OPPOSITION TO UNION'S REQUEST FOR REVIEW**

Thomas V. Walsh, Esq.
JACKSON LEWIS P.C.
Attorneys for Employer
44 South Broadway, 14th Floor
White Plains, New York 10601
(914) 872-8060

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## EMPLOYER'S OPPOSITION TO UNION'S REQUEST FOR REVIEW

Pursuant to Section 102.67(f) of the Rules and Regulations of the National Labor Relations Board ("the Board" or "NLRB"), KIPP Academy Charter School (the "Employer," "KIPP Academy," or "the school") submits this Opposition to the Request for Review filed by the United Federation of Teachers, Local 2, AFT, AFL-CIO ("the UFT" or "the Union") in the above captioned matter.

## STATEMENT OF THE CASE

The Decision and Direction of Election was consistent with the Board's established case law and was amply supported by the record evidence. The Union failed to establish any of the grounds mandated by the Board's Rules and Regulations for a grant of review.

The UFT asserts that KIPP Academy is a political subdivision and thus exempt from the jurisdiction of the Act. It premises this on an arcane provision of state law which has resulted in KIPP Academy being labeled a "conversion school," and upon a series of now-familiar factual assertions regarding state regulation of the school. The Union's arguments ignore the fact that the state law urged by the UFT also defines the school as a private entity, separate from government control. The UFT also ignores consistent Board precedent regarding charter schools in New York (and in many other states) which *rejects* the Union's theory of NLRA exemption based on school regulation.

The UFT also argues that the only appropriate bargaining unit is one that would include KIPP Academy and every public school in New York City. This ignores the inescapable facts that the employees at issue are *not* employed by the public schools, that any putative history of representation has been offset by two decades of UFT disregard for KIPP Academy employees, and that KIPP Academy employees share no community of interest with public school teachers.

Finally, the UFT argues that the NLRB should exercise its statutory discretion to decline jurisdiction over the school, despite the scores of cases from California to Connecticut in which the Board and its regional offices have recognized that charter school employees enjoy the protections of the Act.

## A. The Petition, Relevant Background, and the Regional Director's Decision and Direction of Election.

### 1. A Short History of KIPP Academy.

KIPP Academy is a charter school in the Bronx, New York. It was granted a charter by the New York City Board of Education in 1999 as a so-called "conversion" school under the then-new New York Charter School Act of 1998 (Education Law, Article 56, § 2850, *et seq.*,

hereinafter "CSA").[1] The Charter School Act provides for the creation of public schools by private entities as an alternative to the traditional, government-operated, public school system. The vast majority of charter schools are "start up" entities. With certain provisos, the CSA allows such schools to open separate from any bargaining unit present in that school district; employees of such schools are not represented by any labor organization, although they may subsequently be organized. The CSA also allows existing public schools to convert to charter school status. Such schools cease to be administered directly by their school district but function in the same manner as all other charter schools in New York State. However, their employees are deemed to be represented by the labor organization representing employees in the district, and they are considered to be in that school district's bargaining unit and potentially covered by the district's collective bargaining agreement. Notwithstanding this, the CSA empowers employees in the conversion school to modify their collective bargaining agreement directly with charter school leadership, irrespective of the existence of the broader bargaining unit.

KIPP Academy began its existence as an intervention program introduced by a handful of individuals at Public School 156 in the Bronx in 1995. It is undisputed that the KIPP program was started by these individuals, who were hired as teachers by P.S. 156 so they could conduct the program. The school had no independent existence as a "public school," it was merely a few classes providing some students with an alternative learning experience. All its employees were P.S. 156 teachers, employed by the New York City Board of Education, therefore they were

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[1] The Employer has always asserted (and continues to assert) that KIPP Academy is not a conversion school because, as detailed in record and in its Post-Hearing Brief, at no time prior to the grant of the charter was KIPP Academy a "public school" in and of itself. The Regional Director, relying on the wording of the school's application rather than the weight of the related relevant evidence, held that the school is a conversion school within the meaning of the CSA. (Decision at 7, fn. 14).

technically subject to the city-wide UFT collective bargaining agreement. Notably, from the inception of KIPP Academy classes at P.S. 156, KIPP Academy teachers knowingly worked under terms and conditions of employment that were vastly different from the UFT agreement. The UFT never filed a grievance nor did it inquire as to KIPP Academy's disregard of the contract.

In 1998, the founder of the KIPP concept at P.S. 156 – David Levin – opted to seek approval for a charter school under the new state law. Mr. Levin was motivated by the impending disestablishment of the KIPP program due to Board of Education changes in space allocation affecting P.S. 156. KIPP Academy had no standing as a Board of Education entity, it was only an experiment conducted by several teachers. In the absence of a new charter school, the students who had benefitted from the KIPP program would be relocated to other classes and schools. In order to obtain approval to create KIPP Academy as a charter school in a timely manner to preserve the student body it served, Mr. Levin applied for a charter as a "conversion" school – despite the fact that KIPP Academy was not an existing public school, and should not have been properly deemed eligible for "conversion" status.

However, in 1999 KIPP Academy was granted a charter, ostensibly as a conversion school. As a result, the teachers and staff remained – in theory – covered by the UFT collective bargaining agreement so that their health and retirement benefits could be maintained. Once established as an independent conversion school, KIPP continued to ignore the terms of the city-wide agreement – again without any comment or complaint from the UFT.

In 2009, KIPP Academy teachers unanimously filed a petition for decertification of the UFT with the New York State Public Employment Relations Board ("PERB"). The teachers sought to be recognized as having set their own terms and conditions of employment separate

from the UFT. PERB is the state agency authorized to adjudicate cases under the New York Employees Fair Employment Act, commonly known as the "Taylor Law." (NY Civil Service Law, Article 14). The UFT argued that KIPP Academy was a conversion charter school under the CSA, therefore its employees were part of the city wide bargaining unit covered by the UFT agreement. The UFT opposed any vote by the teachers regarding representation, despite the fact that there was never any certification of the UFT as their bargaining representative, and the UFT never provided any representation to the teachers at KIPP. PERB agreed with the UFT based on the CSA, though it noted that the UFT had never been certified as the bargaining representative. *KIPP Academy Charter School*, 45 PERB 3013, Case No. C-5879 (March 5, 2012) (slip op. at 20-21). PERB rejected the argument that CSA § 2854(3)(b) allowed conversion school employees to deal directly with school leadership. *Id.* (slip op. at 18-19). PERB thus forced the CSA to fit the familiar bargaining unit definition of the Taylor Law, despite the plain wording of the statute, and despite the legislature's express admonishment that the CSA shall govern and be controlling where there is any inconsistency with any other state law. CSA § 2854(1)(a). PERB dismissed the employees' petition.

Although the circumstances of KIPP Academy becoming a charter school did not fit the statutory definition of a "conversion" school, the Regional Director found the Employer to be a conversion school, simply because "Levin applied for, and was granted a charter to operate a conversion school." (Decision at 7, fn.14).[2] Although noting that KIPP Academy has not

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[2] Throughout this Employer's Opposition Brief, references to the Employer's hearing exhibits are designated "E. Ex. __"; and references to the Union's exhibits are designated "U. Ex. __". References to the hearing transcript are designated "Tr. at__". References to the Decision and Direction of Election are cited as "Decision at __." References to the Union's Request for Review are designated as "U. Req. at __". References to the Employer's Post-Hearing Brief are designated as "E. Brief at__."

adhered to much of the UFT agreement, and noting KIPP's argument that its employees exercised their right to create their own agreement with the Employer irrespective of the UFT, the Regional Director avoided making any finding regarding applicability of the UFT city-wide agreement to KIPP Academy. (Decision at 16, fn. 24).

### 2. The UFT's Contentions and the Regional Director's Decision and Direction of Election.

The UFT argued at hearing that because KIPP Academy is a conversion charter school, it is a political subdivision and thus exempt from the jurisdiction of the Act.[3] Alternatively, it argued that the appropriate bargaining unit for KIPP Academy employees is the UFT city-wide unit of public school teachers. Further, the Union urged that Board should exercise its discretion to decline extending jurisdiction over KIPP Academy.

The Regional Director did not agree with the UFT, holding that KIPP Academy is an "employer" within the meaning of Section 2(2) the Act; it is not a state or political subdivision exempt from the Act's coverage; that a unit limited to KIPP Academy employees is appropriate;[4] and that the record strongly favors the exercising of Board jurisdiction. (Decision at 2).

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[3] As noted by the Regional Director, the Union declined to assert this argument in its post-hearing brief. (Decision at 2, fn.2).

[4] The Regional Director found the following unit to be appropriate:

> Included: All full-time and regular part-time teachers, counselors, social workers, team leaders, and specialists employed by the Employer at its facility located in the Bronx, New York.
>
> Excluded: All other employees, including substitute teachers, clerical, maintenance, supervisor, managers, and guards, within the meaning of the Act.
>
> The following classifications will vote subject to challenge: deans, director of support services, and teaching fellows.

The Regional Director thus directed that an election be held in this matter.[5]

**B. The UFT Has Failed to Establish Any Grounds for Review.**

Pursuant to the Rules and Regulations of the National Labor Relations Board, a request for review will only be granted for compelling reasons, based on one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(Rules and Regulations, § 102.67(d)). The UFT's Request for Review fails to assert any compelling reason to grant review of the Regional Director's Decision and Direction of Election. Indeed, the Request for Review does not identify facts or arguments which the Board may consider consistent with its Rules and Regulations.

**C. The UFT Failed to Identify any Material Basis to Distinguish KIPP Academy from the Rule of *Hyde Leadership*.**

The Regional Director, relying on directly applicable Board precedent in *Hyde Leadership Charter School*, 364 NLRB No. 88 (slip op. at 1, fn.2), found that KIPP Academy

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[5] KIPP Academy employees have been waiting ten years for a vote on the issue of UFT representation. Under the Rules and Regulations of the National Labor Relations Board, the pendency of a Request for Review does not act as a stay to a directed election. (Rules and Regulations §§ 102.67(c) and (h)). Moreover, a stay constitutes "extraordinary relief" which the UFT has not requested. (Rules and Regulations § 102.67(j)(1)(i)).

was not a political subdivision exempt from jurisdiction of the NLRA. The Board in *Hyde Leadership* applied its long-standing test based on the Supreme Court decision in *H Utility District of Hawkins County*, 402 U.S. 600 (1971) ("*Hawkins County*"). (Cited at 364 NLRB No. 88 (slip op. at 1, fn.2)). The UFT, however, contends that KIPP Academy is a political subdivision under the *Hawkins County* test.

The first prong of *Hawkins County* requires a review of how the school was founded – was it initiated by, applied for, or otherwise originated by an arm of the government or by an elected official. In finding that KIPP Academy was not a government entity, the Regional Director focused on the process in which KIPP Academy was founded:

> [A]s the founding of KIPP Academy under the CSA was, in all material respects, identical to the founding of the school analyzed in *Hyde Leadership*, I find that the Employer was not directly created by a New York government entity, special statute, legislation, or public official, but instead by private individuals as a nonprofit corporation.

(Decision at 7, quotes deleted). However, the Union argues that the establishment of conversion charter schools is "wholly different" from that of Hyde Leadership. The Union offers scant support to show any distinction between the KIPP Academy and Hyde Leadership schools.

### 1. The Record Facts Urged by the UFT only Underscore the Similarity between KIPP Academy and Non-conversion Charter Schools.

The UFT urges that primary difference between start up and conversion charter schools is that the CSA requires a converting public school be supported by a vote of a majority of students' parents. CSA § 2851(c)(3); (U. Req. at 3). The Union is correct that start-up charter schools do not have this requirement, but it is for the plainly obvious reason that there are no students at a school that does not yet exist.

More significantly, the balloting mandated by the CSA is not a vote of the school board, not approval by the city council, not the endorsement of an elected official, but an expression of support by *private individuals* with a vested interest in their children's education. If anything, this requirement further *supports* a finding that KIPP Academy was founded by private sector action.

The Union further contends that KIPP Academy must be a political subdivision of the state because the New York Board of Regents granted a charter for the school to operate within the New York City Department of Education. (U. Req. at 3). However, this bald contention fails to differentiate KIPP Academy from any other charter school in New York City, including Hyde Leadership. 364 NLRB No. 88 (slip op. at 2), *see also* CSA at § 2851(3)(a).

The UFT asserts KIPP Academy differs from other charter schools because once granted charter status, KIPP maintained the same student population as it had when it was conducting classes at P.S. 156. (U. Req. at 3). Conventional charter schools must utilize a lottery procedure for admissions. Nonetheless, while this was true in 2000, the first year of KIPP Academy's charter operation, it ignores the fact that since then the school has been required to follow the lottery admissions method common to all charter schools. (Tr. at 41, 449). Today, there is no distinction between KIPP Academy and Hyde Leadership, or any other charter school.

The UFT contends that the New York City Department of Education is required to provide funding and that it provides space to KIPP Academy. (U. Req. at 4). This proves no distinction between KIPP Academy and non-conversion schools. The DOE, like any school district in New York State, is required by the CSA to provide funding according to a statutory formula to all charter schools within its borders, regardless of whether they are conversion or conventional charter schools. (CSA § 2856(1)(a)). Hyde Leadership is no different. (364 NLRB

No. 88, (slip op. at 2). See also *Evergreen Charter School*, 29-RD-175250 (Decision and Direction of Election at 6, 15; May 27, 2016); *Riverhead Charter School*, 29-RD-132061 (Decision and Direction of Election at 7; August 14, 2014)).[6]

The NYC DOE rents space to KIPP Academy for $1 a year. (Tr. at 86). Other charter schools are provided space in a public school without charge. 364 NLRB No. 88, slip op. at 3. See also *Evergreen Charter School*, *supra* (Decision and Direction of Election at 6); *Riverhead Charter School*, *supra* (Decision and Direction of Election at 7).

The UFT argues that because KIPP Academy is a conversion school, it is subject to oversight by the Chancellor of the New York City Department of Education, who is responsible for ensuring that KIPP complies with all applicable laws, regulations and charter provisions. (U. Req. at 4). The UFT further contends that the Charter Schools Act specifically provides the NYC DOE with the authority to visit, examine into, and inspect the charter school, and that KIPP is required to remit certain records to the NYC DOE, including financial statements, board meeting minutes, and academic outcomes for students. (U. Req. at 4).

These arguments are without merit. Under the CSA, all charter schools in New York state are subject to the oversight and supervision of their school district and the chartering entity, be they start up or conversion schools.

> The board of regents and charter entity shall oversee each school approved by such entity, and may visit, examine into and inspect any charter school, including the records of such school, under its oversight. Oversight by a charter entity and the board of regents shall be sufficient to ensure that the charter school is in compliance with all applicable laws, regulations and charter provisions.

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6 The National Labor Relations Board rejected union Requests for Review of the Regional Director's decisions in unpublished decisions. *Evergreen*, 29-RD-175250 (October 27, 2016); *Riverhead*, 29-RD-132061 (October 7, 2016).

CSA § 2853(2). Further,

> [T]he school district in which the charter school is located shall have the right to visit, examine into, and inspect the charter school for the purpose of ensuring that the school is in compliance with all applicable laws, regulations and charter provisions.

CSA § 2853(2-a). These provisions apply equally to both conversion and non-conversion schools.

The UFT asserts that if KIPP Academy fails to comply with its charter provisions, or the law, the Chancellor of the NYC DOE may terminate KIPP's charter and close the school. (U. Req. at 4). This falsely implies that only conversion schools can be terminated due to non-compliance. This is not the case. Nothing in the CSA suggests that this authority is limited to conversion schools, or that this power is exclusive to Chancellor of the New York City Department of Education. In fact, the mandates for compliance and the risk of termination due to non-compliance apply to <u>all</u> charter schools throughout the state without regard to conversion status. CSA §§ 2853(2-a), 2855.

The Board has consistently found the requirement that New York charter schools maintain compliance with state laws and regulations does not establish that they are "political subdivisions" of the state. *Hyde Leadership*, 364 NLRB No. 88 (slip op. at 4). *Evergreen Charter School*, 29-RD-175250 (Decision and Direction of Election at 6-7); *Riverhead Charter School*, 29-RD-132061 (Decision and Direction of Election at 7).

### 2. <u>The CSA Conversion School Provisions Do Not Establish that KIPP Academy Is an Administrative Arm of the State</u>.

The UFT also argues that KIPP Academy remains part of the New York City Department of Education school system, and thus is a political subdivision exempt from the Act, because CSA § 2854(3)(b) states that a converted charter school "shall be deemed to be included within

the negotiating unit containing like titles or positions, if any, for the school district in which such charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit." In sum, the UFT argues that if KIPP Academy employees and DOE teachers are in the same public school bargaining unit, KIPP Academy must in all material respects be a public school, and thus an arm of New York City government.

The UFT thus contends that the tail should wag the dog. The CSA irrefutably states that all employees of charter schools – conversion or otherwise – are employees of the education corporation formed to operate the charter school and not employees of the local school district. CSA § 2853. The Regional Director recognized this, holding:

> [T]he mixed KIPP Academy-DOE unit sought by the Union is by definition inappropriate. There is no basis in Board law to find appropriate a unit which includes multiple classifications of public and private sector employees working for, on the one hand, the Education Department of New York City, and, on the other, an educational institution which is an "employer" under Section 2(2) of the Act. Indeed, I must reject such a unit as inherently inappropriate…

(Decision at 19).

Nonetheless, the Union argues that the CSA provision under which conversion school employees remain in the same district collective bargaining unit as non-charter schools thereby deprives the school of all its distinctive charter school attributes, and it remains a public school like any other. This ignores the CSA's express reservation of the conversion school employees' right to negotiate their own terms and conditions separate and apart from the district's conventional bargaining unit, CSA § 2853(3)(b), a provision which allows conversion employees to opt out of the district's bargaining unit at their discretion. It also ignores the traditional criteria for an appropriate bargaining unit – criteria which the Regional Director found conclusively established KIPP Academy employees as constituting their own separate unit.

The UFT also asserted that KIPP Academy stands in the shoes of the state by providing students with "a free public education" the same as DOE schools. (U. Req. at 10). The Regional Director, citing *Hyde Leadership*, distinguished KIPP Academy from the DOE by finding the school acts as a government contractor and not as a public employer itself. (Decision at 9, *citing* 364 NLRB No. 88 (slip op. at 8, fn. 26)). This is not a novel theory. The Board made the same finding in *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (slip op. at 3-6, August 24, 2016), citing *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002). Moreover, federal law has long recognized that while private-sector government contractors may perform work for the government, those contractors retain their identity as employers, and are subject to the NLRA. *See,* McNamara-O'Hara Service Contract Act of 1965, § 41 U.S.C. § 351, 354(c).

### 3. The Regional Director Correctly Found KIPP Academy Employees Constitute Their Own Separate Unit.

The UFT's contention that the Board lacks jurisdiction depends on KIPP Academy employees remaining in the UFT-DOE city-wide unit. To the extent this has any merit at all, it requires the naysaying of the Regional Director's finding that KIPP Academy employees constitute their own separate bargaining unit.

The Regional Director found that KIPP Academy employees are a separate and distinct group, independent of the UFT bargaining unit. (Decision at 18-20). KIPP Academy employees share a community of interest with one another, but do not share a community of interest with DOE employees. (Decision at 17). As amply supported by the record, the Regional Director found that KIPP Academy employees are:

- Separately employed from DOE employees;
- Organized into job classifications and supervised separately from DOE employees;
- Have only limited and incidental contact with DOE employees;
- Have no interchange nor functional integration with DOE employees; and
- Do not share common terms and conditions of employment with DOE employees.

(Decision at 18). The UFT disputes that KIPP Academy's terms and conditions differ, (U. Req. at 6), asserting that the school's employees have the same health and retirement benefits as DOE employees.[7] However, as found by the Regional Director, "in virtually all other material respects, KIPP Academy's employees work under different conditions than DOE employees." (Decision at 18). The UFT's contention is contradicted by its own evidence, a pending grievance which specifically enumerates many (but not all) of the myriad ways in which KIPP Academy's working terms differ from that of the DOE collective bargaining agreement. (Decision at 15; U. Ex. 14).[8]

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[7] KIPP Academy provides its employees with the same medical plan through the New York City Office of Labor Relations, as well as dental, vision, and other benefits through contributions to the UFT Welfare Fund. (Tr. 94-97; E. Ex. 17). The medical plan is a package of insurance arranged through the Office of Labor Relations and all of the City of New York's municipal unions. (Tr. 40, 97). It is not a UFT contract term. The school also maintains *separate* participation in the public employees' NYC Teachers' Retirement System ("TRS") benefits. (Tr. 94-97; E. Ex. 17). The TRS benefit is made available not by the UFT, but by operation of the CSA, § 2854(3)(c), and is thus available to all charter schools, conversion or otherwise. Further, the Taylor Law expressly prohibits any collective bargaining over the terms of this public retirement plan. Taylor Law, § 201(3). Thus, the limited similarities in benefits between the UFT agreement and KIPP Academy are not the result of any bargaining relationship between the parties.

[8] The UFT asserts that KIPP Academy provided retroactive pay bonuses to its employees, pursuant to the UFT-DOE agreement (called "lump sum" payments). (U. Req. at 6; Tr. 176). The Regional Director noted the school's explanation that any "lump sum" payments were based on its desire to remain competitive with the NYC market for teachers. (Decision at 17). The fact that bonus payments to KIPP Academy employees were not provided pursuant to the UFT

The UFT's 2016 grievance contends that KIPP Academy should have conformed to the terms of the DOE agreement since its chartering in 2000, despite the school's sixteen years of overt disregard and the Union's acquiescence. However, it is undisputed that KIPP Academy ignored the terms of the UFT agreement from its beginning at P.S. 156 in 1995. (Tr. 22, 29). The Regional Director notes that the school's disparate employment "terms and conditions have existed for as long as twenty years, and that these differences go to the core educational model of the school." (Decision at 18). From the time of Mr. Levin's application for a charter, the working terms of KIPP Academy employees differed substantially from those of DOE schools – and those differences were part of the distinctive KIPP educational method which were a basis for approval of the charter application. (E. Ex. 1, pp. A-256, A-319, A-334).

The UFT argues that all KIPP Academy employees – teachers, social workers, and counselors – have been and should continue to be included in the New York City teachers-only bargaining unit despite the existence of separate UFT units and collective bargaining agreements for social workers and counselors. (Tr. 403; E. Exs. 13-14). Although the Regional Director made no findings in this regard, the Union's insistence upon including non-teachers in the UFT teacher unit underscores the dichotomy between the DOE unit and the unit at KIPP Academy.[9]

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agreement is underscored by the Union's own grievance which states, in part, that the school "has failed to pay teachers the contractual 'Lump Sum' payments, in violation of … the Teachers Collective Bargaining Agreement." (U. Ex. 14, *see also* the UFT demand for arbitration, U. Ex. 16).

[9] It also ignores the terms of the very statute contended by the UFT to be determinative here. Under CSA § 2854(3)(b) a converted charter school "shall be deemed to be included within the negotiating unit containing like titles or positions, if any, for the school district in which such charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit."

4. **There Is No "Bargaining History" Between the UFT and KIPP Academy.**

The Regional Director noted that the Board may also consider the parties' prior bargaining history in determining the appropriateness of a bargaining unit. (Decision at 18). Here, the Regional Director found that any extant bargaining history between the parties is inadequate to find KIPP Academy and the DOE unit coterminous. The UFT asserts that the Regional Director should have recognized the Union has continually represented the employees of KIPP Academy since 2000, and that the school acted accordingly by deducting and remitting dues to the UFT. (U. Req. at 5). However, this putative bargaining history is specious. The uncontroverted record evidence shows that KIPP Academy disregarded the terms of the DOE collective bargaining agreement at all times, extending back to its days as an intervention program within P.S. 156 – a fact which was admittedly ignored by the UFT until 2016. (Tr. at 36, 296-298). Until 2016, the Union did not even have a chapter leader at the school. (Tr. 149, 240-241, 249, 251). Employees at the school were never given a vote on UFT contract ratification. (Tr. 169). KIPP Academy leadership was never provided with a copy of the UFT contract. (Tr. 499). Until 2016, the UFT never posed a complaint, grievance, or even an inquiry as to the School's indifference to the terms of Union's agreements. (Tr. 498-499).[10]

At no time did KIPP Academy and the UFT ever deal with each other over employees' terms and conditions in any manner which could arguably be considered "bargaining" within the meaning of the Act.

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[10] The first grievance with KIPP Academy was identified by the Union as "Case # 001." (Tr. 322; U. Ex. 14).

The contention that the Employer deducted and remitted "dues" to the UFT is irrelevant to any determination of a combined UFT-KIPP Academy bargaining unit, nor does it speak to any bargaining relationship between the parties. Union security provisions, common in agreements under the NLRA, are unlawful for public sector employers under the Taylor Law. § 208(3)(a). Moreover, public sector labor agreements – like the UFT contract – have no "dues checkoff" provisions because the state law requires employers to deduct union membership dues from employees' pay for remittance to the union. For any employees who are not union members, the statute requires employers to deduct "agency shop fees" in an amount equal to full dues. Taylor Law §§ 201(2)(b), 208(3)(a). That KIPP Academy sent dues and/or agency fees to the UFT does not reflect any agreement between the parties, but rather that KIPP Academy was constrained to comply with state law.

Moreover, as noted by the Regional Director, the statutory collective bargaining mechanism contemplated by the CSA for conversion schools contains a peculiar provision under which

> [A] majority of the members of a negotiating unit within a [conversion] charter school [to] modify, in writing, a collective bargaining agreement for the purposes of employment in the charter school with the approval of the board of trustees of the charter school.

(Decision at 10, *citing* CSA § 2854(3)(b)). As fully described in the Employer's Post-Hearing Brief, the plain wording of the CSA states that the employees of a conversion school may opt to amend the terms of their district-wide collective bargaining agreement directly with the leadership of the school, *without* the participation of the labor organization representing district employees. (E. Brief at 14, 18). KIPP Academy and its employees exercised this option from the school's very beginning, as evidenced by the employment terms and work rules articulated in

cMr. Levin's application – and which were endorsed in writing by all of KIPP Academy's initial employees. (Tr. 100-101). Thus, KIPP Academy, at inception, created its own version of the collective bargaining agreement, as empowered to do so by the Charter School Act itself.

The UFT contends that, contrary to the plain language of the statute, this CSA provision still requires the participation of the Union. (U. Req. at 13). The UFT cites a 2012 PERB decision which applied the traditional Taylor Law principle of exclusive bargaining representation even to the employees of a conversion school (U. Req. at 5, citing *KIPP Academy Charter School, supra,* 45 PERB 3013). PERB is the state agency empowered to enforce the Taylor Law, not the Education Law. The text of CSA § 2854(3)(b) is contrary to conventional notions of collective bargaining – however, conversion charter schools reflect a non-conventional approach to public education. PERB applied the only tool it had, traditional state law bargaining principles, to force the square peg of CSA conversion schools into the round hole of the Taylor Law. PERB's holding has never fit the statute.

The Regional Director recognized that the wording of § 2854(3)(b) reflects a bargaining process that differs but "does not explain the process by which the collective bargaining agreement may be amended, such as whether the collective bargaining representative must be involved." (Decision at 10). The Regional Director found it "unnecessary to pass" whether KIPP Academy employees amended the UFT contract. (Decision at 16, fn. 24). However, he found that the employees' action in adopting the terms and conditions differing from the UFT contract support the contention that "from its earliest days, KIPP Academy's employees knowingly and willingly worked under conditions which differed from those outlined in the citywide collective bargaining agreements." (*Id.).*

The record is clear. KIPP Academy and the UFT have had no bargaining relationship whatsoever. The school has been operating almost completely irrespective of the terms of the collective bargaining agreement for more than twenty years. The school and its employees have asserted their right under the plain wording of the CSA to independently establish their own terms and conditions, under color of a state law that creates an alternative method of bargaining.

The Regional Director correctly stated that in making a unit determination, the Board considers the parties' bargaining history so that it will not disturb pre-existing "efficient and stable collective bargaining." (Decision at 18). Here, there has never been a bargaining relationship with the UFT; rather, the absence of bargaining. Further, the Regional Director noted that even where there is a functional bargaining unit, the Board will not be bound to follow it if it is "repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act." (*Id.*, citations omitted).

Because a stand-alone unit is the only unit KIPP Academy employees have ever known, and because the school's employees never had an opportunity to vote, and because a combined unit of public and private sector employees would be plainly "repugnant" to the Act (and unworkable in practice), the unit to vote on the decertification petition must be the petitioned-for unit of KIPP Academy employees alone. Moreover, to hold that the petitioned-for employees must be bound to the UFT city-wide unit would be to deny them the ability to exercise their right to choose.

**D. The UFT Failed to Assert Convincing Reasons to Decline Jurisdiction**

The UFT further argued that the Board should set aside its growing record of finding jurisdiction over charter schools that fail the *Hawkins County* test for exemption from coverage

of the Act by choosing to decline jurisdiction under Section 14(c)(1) of the Act.[11] The Union asserts the Board should make this choice based on vague "public policy" grounds. (U. Req. at 2). However, the Union offers no public policy bases but argues that Board jurisdiction would "have an insubstantial effect on interstate commerce." (U. Req. at 10, citing *Hyde Leadership,* 346 NLRB No. 88 (slip op. at 9-10, Miscimarra dissent)). Further, the UFT contends the Board should refrain from asserting jurisdiction over charter schools due to "state regulation" and the "unique and special relationship" between the schools and the state. (U. Req. at 11, citations omitted).

The Regional Director rejected the UFT's arguments made at hearing, stating that "policy reasons weighing in favor of asserting jurisdiction far outweigh those militating against a jurisdictional assertion in this case." (Decision at 20). Board law strongly supports the Regional Director's conclusion.

**1. <u>The Board Has Consistently Found Charter Schools Satisfy Jurisdictional Standards</u>.**

The NLRB has found that charter schools in New York and elsewhere adequately satisfy the jurisdictional standards of Board.[12] In New York, the Board has ruled upon three cases, *Hyde Leadership, supra,* 364 NLRB No. 88; *Riverhead Charter School, supra,* 29-RD-132061

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11 Section 14(c)(1) reads, *in pari materia*:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act… decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction…

29 U.S.C. § 164(c)(1).

12 The Board asserts jurisdiction over non-profit educational institutions which have a gross annual revenue of not less than $1 million. Rules and Regulations § 103.1. This jurisdictional threshold has applied since the Board's decision in *Cornell University*, 183 NLRB 329 (1970).

and *Evergreen Charter School*, *supra*, 29-RD-175250 (in *Riverhead* and *Evergreen* the NLRB issued unpublished decisions rejecting requests for review of a regional director's assertion of jurisdiction). This does not include the many New York charter school representation and unfair labor practice cases over which Board regions have asserted jurisdiction for the processing of petitions, elections, certifications, and charges. These include, but are not necessarily limited to, *Amber Charter School,* 02-CA-225854; *Charter School of Inquiry*, 03-CA-214034, 03-CA-215871, 03-CB-216058, 03-CA-218212; *Global Concepts Charter School*, 03-RC-192601; *Rosalyn Yalow Charter School*, 02-RC-213029; *Sisulu Walker Charter School of Harlem*, 02-RD-201066; and *Charter School of Educational Excellence*, 02-RD-180608.

Outside of New York, the Board or its regions have similarly asserted jurisdiction, and/or engaged the Board's processes over every charter school which has come to the Board's attention with one exception.[13] The following charter school cases are examples:

Arizona

- *Excalibur Charter School*, 366 NLRB No. 49 (March 29, 2018);
- *Legacy Traditional School*, 28–CA–201248.

California

- *Farmworker Institute of Education and Leadership Development,* 31-RC-164338. (Unpublished Board denial of request for review, November 7, 2016);

Connecticut

- *The Woodstock Academy,* 01-CA-172457, 01-CB-169525 (Division of Advice Memorandum, October 11, 2016).

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13 The only case in which no jurisdiction was found is *LTTS Charter School,* 366 NLRB No. 38 (March 15, 2018). That case did not turn on Section 14(c)(1) discretion, but on the peculiarities of Texas charter school law which reserved state authority over the school such that it was deemed exempt from the Act under the *Hawkins County* test. In *LTTS*, the Board expressly distinguished applicable Texas state law from New York law as described in *Hyde Leadership,* (cited at 366 NLRB No. 38, no.1).

District of Columbia

- *Cesar Chavez Public Charter Schools for Public Policy,* 05-CA-204862, 05-CA-210887, 05-CA-214193, 05-CA-223377, 05-CA-199635;
- *Paul Public Charter School*, 05-CA-194836, 05-CA-195587.

Illinois

- *Chicago Mathematics & Science Academy*, 359 NLRB 455 (2012);
- *Pilsen Wellness Center*, 359 NLRB 626 (2013);
- *AHS Passages Charter School*, 13-CA-199407, 13-AC-224549;
- *Chicago Quest*, 13-RC-146024;
- *Namaste Charter School*, 13-RC-212742, 13-UC-218740;
- *Noble Network of Charter Schools,* 13-CA-200630, 13-CA-196396.

Louisiana

- *International High School of New Orleans*, 15-RC-175505 (request for review denied, upheld *sub. nom. Voices for International Business and Education v. NLRB, __ F. 3d __, 17-60364 (5th Cir. September 21, 2018)*;
- *Lusher Charter School*, 15-RC-174745 (request for review denied);
- *Mary D. Coghill School,* 15-RC-197643 (request for review denied).

Michigan

- *Charter School Administration Services, Inc.*, 353 NLRB 394 (2008);
- *Innovative Teaching Solutions*, 07-CA-49061 (Division of Advice Memorandum, February 15, 2006);
- *Detroit 90/90 and Axios, Inc.*, 07-RC-150097;
- *New Urban Learning,* 07-RC-148928.

Minnesota

- *Community School of Excellence*, 18-CA-145860, et al (Board approval of formal settlement in multiple unfair labor practice cases, July 12, 2016);
- *Art and Science Academy*, 18-RC-208140;
- *Twin Cities German Immersion School*, 18-RC-113483.

Ohio

- *Northeast Ohio College Preparatory School*, 08-CA-162121, et al. (Board approval of formal settlement in multiple unfair labor practice cases, September 13, 2016);
- *Stepstone Academy,* 08-RC-196813;
- *Summit Academy Community School for Alternative Learners*, 08-RM-1068.

Oregon

- *Trillium Public Charter School*, 19-RC-199400.

Pennsylvania

- *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (August 24, 2016),
- *New Foundations Charter School*, 04-RC-199928 (request for review denied, January 3, 2018)
- *Vida Charter School*, 05-RC-197557 (request for review denied, October 24, 2017)
- *Pennsylvania Cyber Charter School*, 06-RC-120811 (request for review denied, April 9, 2014);
- *Agora Cyber Charter School*, 04-RC-141319, 04-RC-170767, 04-RC-179402;
- *Montessori Regional Charter School,* 06-RC-199377, 06-RC-210728;
- *John B. Stetson Charter School*, 04-RC-151011;
- *Young Scholars of Western PA Charter School*, 06-RC-210615.

Tennessee

- *Soulsville Charter School*, 26-CA-24027.

The overwhelming weight of Board law – and what has now become standard practice – is to assert jurisdiction over charter schools unless there is a clear reason to exempt a school from the Act pursuant to *Hawkins County*. In *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (August 24, 2016), the Board conclusively addressed the contention that charter schools' impact upon commerce is "insignificant":

> [W]e disagree with the dissent's suggestion that charter schools overall have an insignificant impact on interstate commerce. Charter schools are a significant, and growing, category of employers in the education sector. From the school year 1999-2000 to 2012-2013, the percentage of all public schools that were charter schools increased from 1.7 to 6.2 percent, and charter schools have generally increased in enrollment size over time.

364 NLRB No. 87 (slip op. at fn. 25, source citation omitted). In every one of the cases cited above, the Board found charter schools, like KIPP Academy, met the jurisdictional standards. There is no basis to find the jurisdictional standards do not apply in the case at bar.

**2. The "Special Relationship" Exemption from Jurisdiction Is Specific to the Pari-Mutuel Gambling Industry.**

The UFT contends that Charter Schools Act heavily regulates charter schools, and this regulation creates a "unique and special relationship" between the state and charter school industry. (U. Req. at 11). The Union cites several cases for this proposition, but each of them concerns employers in the pari-mutuel racing industry. *Yonkers Raceway*, 196 NLRB 1202 (1972); *Meadow Stud*, 130 NLRB 373 (1961); *Jefferson Downs,* 125 NLRB 386 (1959); *Hialeah Race Course*, 125 NLRB 388 (1959); *New York Racing Association v. NLRB*, 708 F.2d 46 (2d Cir. 1983) (cited at U. Req. 11). This is for good reason, as the Board's blanket declination of discretionary jurisdiction is peculiar to the gambling industry.

The Board cases cited above predate the 1973 issuance of an NLRB rule formally declining jurisdiction in the horseracing and dogracing industries.[14] Upon issuance of the ruling the Board published a commentary explaining its exercise of discretion. 38 F.R. 9537 (1973).

The Board commentary notes that a "unique and special relationship has developed between the States and these industries." 38 F.R. 9537 (1973). In sum, the Board recognized that pari-mutuel gambling businesses provide a substantial source of *revenue* for the states. As such, the states determine the number of days the tracks will operate and the amount of revenue to be retained by the employers (the remainder remitted to the state). (*Id.*). The state racing commission exercise close supervision over the businesses and its employees, specifically to safeguard the states' interest in employee conduct which could jeopardize the "integrity" of the gambling industry. (*Id.*).

The Board also noted that "the sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force." (*Id.*). The short term of employment "gives [the Board] pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed both by attempts to conduct elections and to make effective any remedies for alleged violations of the Act." (*Id.*).

The Board found that there were "relatively few labor disputes have occurred in these industries in recent years, thus reaffirming the Board's earlier assessment that the impact of labor disputes in these industries is insubstantial." (*Id.*).

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14 Rules and Regulations, § 103.3.

The operations of pari-mutuel businesses and charter schools could hardly be less similar. While it is true that state has an interest in maintaining standards in charter schools, the nature and scope of the "special relationship" between race tracks and the state is qualitatively different from the operation of a school. KIPP Academy generates no income for the DOE. As there is no tuition charged by the school, there is no student revenue stream controlled by the DOE. Employment at KIPP Academy is not casual, part-time, or sporadic. Remedial action for violations, the process of collective bargaining, and the holding of elections under the Act have been ongoing across the country for several years. Similarly, the numerous election and unfair labor practice cases cited above demonstrate that there are frequent "labor disputes" (within the meaning of the Act) in the charter school industry.[15]

### 3. A Discretionary *Post Hoc* Declination of Jurisdiction Would Frustrate the Purposes of the Act.

The Union argues that application of the Act, which will enable KIPP Academy employees to vote, "destabilizes the long-standing bargaining relationship that KIPP, KIPP teachers, and the UFT have benefitted from under the Charter Schools Act." (U. Req. at 14). One can hardly characterize the labor law circumstances at KIPP Academy as "stable." The UFT asserts that state law mandates application of a public sector collective bargaining agreement. However, that agreement has been abrogated by the school (under color of law), which was then ignored by the Union for over twenty years. The putative agreement was amended by employees pursuant to a state education statute that itself is in conflict with state

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15 Notably, the Board has asserted jurisdiction over jai alai frontons, despite the fact that they are virtually the same pari-mutuel gambling industry as racetracks. Employment in jai alai arenas differs from employment at racetracks in that the work force is stable, hours are consistent, and the duration of employment is longer. *Volusia Jai Alai*, 221 NLRB 1280 (1975).

public sector labor law. KIPP Academy employees have long had terms and conditions of employment which differ greatly from the asserted contract. They constitute a unit of employees who have never had the right to vote notwithstanding that they have a wide *disparity* of interest with the UFT city-wide unit. The UFT denies that the employees constitute any independent unit. In this proceeding, the NLRB has had the opportunity to review the facts concerning KIPP Academy and has determined that the school meets the Board's well-defined standards for jurisdiction and that KIPP Academy is an "employer" under § 2(2) of the Act, and recognizes the KIPP Academy employees as constituting a separate bargaining unit. Now, for the first time, there will be stability for the employees, the school, and their students under the well-defined rights, responsibilities, and procedures of the Act.

The Regional Director – speaking with regard to KIPP Academy, but also regarding the broader implications of this decision – correctly stated that "a failure to assert jurisdiction… would be disruptive to the apparent industry-wide stability which has existed in New York State since the Board in *Hyde Leadership* found that it can, and should, exercise jurisdiction over New York charter schools." (Decision at 21). As described above, the Board and its regions have engaged at least nine charter schools around New York State with its processes. These have included unfair labor practice investigations and settlements and representation case investigations, stipulations, directions of election, and certifications following elections. A clear message has been sent to employees of charter schools: they are protected by federal law, and they enjoy greater rights than those recognized by state law.

While the Regional Director was solely addressing the case before him, assessing the rule of *Hyde Leadership*, and the application of the *Hawkins County* standards in light of New York's Charter School Act and implicating the state's Taylor Law, Board consideration of this matter

has far broader consequences. *Hyde Leadership's* articulation of *Hawkins County* was not unique to New York. The principles there have been applied identically across the entire country by the Board, its regions, and by administrative law judges. The citation of cases on the preceding pages only underscore the national extent to which Board case law has granted employees in virtually every instance the protections of the Act. To reverse course now would be to disrupt the stability which has been years in the making.

As stated by the Regional Director, the Supreme Court "has consistently declared that … Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." (Decision at 21, citing *NLRB v. Reliance Fuel Oil Corp.,* 371 U.S. 224 (1963)). The significance of this in the decertification case at bar is underscored by a recent decision of the D.C. Circuit:

> The raison d'être of the National Labor Relations Act's protections for union representation is to vindicate the employees' right to engage in collective activity and to empower employees to freely choose their own labor representatives. See *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 , 738-739 , 81 S. Ct. 1603 , 6 L. Ed. 2d 762 (1961) ("[T]he premise of the [National Labor Relations] Act * * * [is] to assure freedom of choice and majority rule in employee selection of representatives."); see also *Skyline Distributors v. NLRB*, 99 F.3d 403 , 411 , 321 U.S. App. D.C. 264 (D.C. Cir. 1996) ("One of the principal protections of the [National Labor Relations Act] is the right of employees to bargain collectively through representatives of their own choosing or to refrain from such activity."). So under Section 9(a), the rule is that the employees pick the union; the union does not pick the employees.

*Colorado Fire Sprinkler, Inc. v. NLRB,* 891 F.3d 1031, 1038 (D.C. Cir. 2018, June 8, 2018)

For the Board to abandon this precedent now would be to tell employees in this growing industry that they do not have Section 7 rights. It would tell KIPP Academy employees that the Act does not protect their ability to choose whether they want union representation. Congress,

the Supreme Court, and historic Board precedent would surely find such a retraction of employee protections repugnant to the Act.

## CONCLUSION

The UFT has failed to demonstrate any basis recognized by § 102.67(d) upon which to grant review. No question of law or policy is raised by the absence or departure from Board precedent. Rather, Board law on point is clear, direct, recent, and is completely consistent with the Regional Director's Decision and Direction of Election. Likewise, the Union does not contend the Decision contains any factual error, nor that there was any prejudicial error in the conduct of the hearing. Finally, the UFT offers no compelling reason for reconsideration by the Board – only the same arguments made repeatedly in numerous cases and rejected by the Board.

For the reasons stated above, the Board should deny the Request for Review.

Respectfully submitted,

JACKSON LEWIS P.C.
44 South Broadway, 14th Floor
White Plains, New York 10601
(914) 872-8060

By: Thomas V. Walsh
Thomas V. Walsh

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White Plains, New York